Filed 12/1/16 Ibarra v. Shiomoto CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SALVADOR CRUZ IBARRA,

Plaintiff and Respondent,

v.

JEAN SHIOMOTO, as Director, etc.,

Defendant and Appellant.

F071703

(Super. Ct. No. CV283009)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. J. Eric Bradshaw, Judge.

Kamala D. Harris, Attorney General, Celine M. Cooper, Michael J. Hui and Kevin Hosn, Deputy Attorneys General, for Defendant and Appellant.

William H. Slocumb for Plaintiff and Respondent.

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The California Department of Motor Vehicles (Department) appeals from the trial court's judgment issuing a writ of mandate commanding the Department to set aside its decision upholding the suspension of plaintiff's driver's license for driving with a blood-alcohol concentration (BAC) of at least 0.08 percent. Substantial evidence supports the trial court's decision, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 18, 2014, at approximately 10:22 p.m., Officer Marks of the California Highway Patrol observed an SUV traveling at 79 miles per hour in an area with a posted speed limit of 55 miles per hour. He initiated a traffic stop. Plaintiff, Salvador Cruz Ibarra, was the driver. As he was obtaining Ibarra's driver's license, vehicle registration, and proof of insurance, Officer Marks smelled an odor of alcohol coming from inside the vehicle, wafting from the open moon roof. Ibarra's eyes were watery and red; he admitted having a glass of wine with dinner between 9:00 p.m. and 9:40 p.m. Officer Marks administered field sobriety tests, which Ibarra was unable to perform properly. Officer Marks formed the opinion Ibarra was under the influence of an alcoholic beverage and was unable to continue operating a motor vehicle safely.

Officer Marks administered a preliminary alcohol screening (PAS) test. After multiple attempts by Ibarra, the officer obtained results of .088 percent BAC at 10:40 p.m. and 0.087 percent BAC at 10:43 p.m. Officer Marks arrested Ibarra for driving under the influence. A subsequent chemical breath test indicated a BAC of 0.09 percent at 11:06 p.m. and 0.11 percent at 11:10 p.m. The officer served Ibarra with an order suspending his driving privilege for driving with a BAC of 0.08 percent or more.

Ibarra requested an administrative hearing to challenge the suspension. At the hearing, Officer Marks testified to the facts surrounding Ibarra's arrest. Another officer testified that the PAS device was properly calibrated at the time of Ibarra's arrest. Plaintiff presented the testimony of an expert toxicologist, Dr. Darrell Clardy, who testified, based on the results of the PAS test and the subsequent breath test, that Ibarra's BAC was rising at the time he was stopped and arrested, so the level of alcohol in his blood at the time he was driving would have been lower. He estimated Ibarra's BAC at the time of driving would have been 0.06 percent. The Department presented no expert evidence.

The administrative hearing officer issued a decision upholding the license suspension. He found the testimony of the two officers to be credible, but the testimony of Clardy to be speculative and not credible because it was not based on an independent study of Ibarra's alcohol absorption rate and was based on information supplied by Ibarra "who had time to think about the consequences of sanctions against his driving privilege prior to the hearing." The hearing officer concluded Ibarra's evidence had not overcome the presumption that a breath test performed within three hours of driving showed the BAC at the time of driving, so the burden did not shift to the Department to prove Ibarra's BAC at the time of driving.

Ibarra petitioned the superior court for a writ of mandate directing the Department to set aside the administrative suspension order. After briefing and a hearing, the trial court entered judgment for Ibarra; it issued a peremptory writ of mandate commanding the Department to set aside its administrative decision suspending Ibarra's driver's license. The Department appeals.

DISCUSSION

I. Standard of Review

Vehicle Code section 13353.2[1] authorizes the Department to suspend a person's driving privilege when the person drives a motor vehicle with 0.08 percent by weight of alcohol in his or her blood. (§ 13353.2, subd. (a)(1).) The person may request an administrative hearing of the matter; at the hearing the only issues are: whether the peace officer had reasonable cause to believe the person was driving in violation of section 23152,[2] whether the person was lawfully arrested, and whether the person was driving with .08 percent or more, by weight, of alcohol in his or her blood. (§§ 13557, subd. (b)(3), 13558, subd. (c)(2).) "If the hearing officer finds these three statutory prerequisites by a preponderance of the evidence, the driver's license to operate a motor

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1 All further statutory references are to the Vehicle Code unless otherwise indicated.

2 Or in violation of sections 23136, 23140, 23153, or 23154.

vehicle will be suspended …." (*Brierton v. Department of Motor Vehicles* (2005) 130 Cal.App.4th 499, 508.)

If the administrative decision is unfavorable, the person "may file a petition for review of the order" in the superior court. (§ 13559, subd. (a).) The review is on the administrative record only. (*Ibid*.) The trial court may rescind the suspension order if it "finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which [was] not supported by the evidence in the record …." (*Ibid*.) The trial court exercises its independent judgment to determine whether the weight of the evidence supports the administrative decision. (*Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 309 (*Bell*).)

On appeal, this court must "determine 'whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court's conclusion that the weight of the evidence does not' support the DMV's suspension order." (*Bell, supra*, 11 Cal.App.4th at p. 309.) "We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings." (*Yordamlis v. Zolin* (1992) 11 Cal.App.4th 655, 659 (*Yordamlis*).)

II. Substantial Evidence

A. Sufficiency of expert opinion regarding BAC

The Department first contends substantial evidence does not support the trial court's determination that it failed to demonstrate Ibarra's BAC was 0.08 percent or more at the time of driving, because Clardy's expert opinion failed to take into account individual variables that affect the rate of alcohol absorption and elimination. It contends Clardy's opinion failed to consider Ibarra's physiology, including his height, weight, sex,

and emotional state, and other factors, such as the type and amount of alcohol and food he consumed. Therefore, the Department concludes, the expert opinion was without adequate foundation and was insufficient to support the trial court's findings.

Section 23152 in relevant part provides: "In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving." (§ 23152, subd. (b).) Appellate courts have held this presumption is applicable in administrative license suspension proceedings. (*Borger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118, 1121; *Corrigan v. Zolin* (1996) 47 Cal.App.4th 230, 236; *Bell*, *supra*, 11 Cal.App.4th at pp. 310–313.)[3]

"A rebuttable presumption requires the trier of fact, given a showing of the preliminary fact (here, that a chemical test result showed plaintiff had a BAC of 0.08 percent or more within three hours of driving), to assume the existence of the presumed fact (here, that plaintiff had been driving with a prohibited BAC) 'unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.' [Citation.] In other words, if evidence sufficient to negate the presumed fact is presented, the 'presumption disappears' [citation] and 'has no further effect' [citation], although 'inferences may nevertheless be drawn from the same circumstances that gave rise to the presumption in the first place.'" (*Coffey*, *supra*, 60 Cal.4th at pp. 1209–1210.)

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3 The California Supreme Court has declined to determine whether the three-hour presumption applies in administrative license suspension proceedings. (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1208, 1209 (*Coffey*).)

There is no dispute that chemical tests administered within three hours of driving showed Ibarra had a BAC exceeding .08 percent. Thus, the rebuttable presumption established Ibarra was driving with a prohibited BAC, unless he adduced evidence that "'would support a finding of [the] nonexistence of'" that fact. (*Coffey*, *supra*, 60 Cal.4th at pp. 1209–1210.) In other words, the presumption would apply unless Ibarra presented evidence that, if believed, would support a finding of the nonexistence of the presumed fact. (*Id*. at p. 1210.) If such contrary evidence was introduced, the trial court was required to weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. (*Ibid*.)

To rebut the presumption, Ibarra offered Clardy's expert testimony. Clardy testified the alcohol level in the human body is dynamic; it increases, reaches a plateau at its peak, then decreases as the alcohol is eliminated. The rate at which alcohol moves through the body, is absorbed into the bloodstream, and is eliminated depends upon variables, such as when the person drank, how much alcohol the person drank, how much food was in the person's stomach, and the person's emotional state. Clardy discussed the amount and type of alcohol Ibarra reported consuming and the food he ate for dinner. He testified that it would be impossible to predict the rate of absorption from a single breath test. However, in this case there was more information from which it could be determined: a second set of chemical tests was administered, so there were two "snapshots" in time that could be contrasted to determine the BAC at a third time, the time of driving. Clardy testified that, over a short period of time, the absorption rate is linear; over a longer period, it would have a slight curvature. The time period involved in this case was short.

Clardy presented three charts of the possible ranges of Ibarra's BAC at the time of driving. Exhibit C used the actual measured breath results, using all three decimal places of the PAS test results and essentially adding a zero in the third decimal place of the subsequent breath test results (i.e., 0.090 & 0.110). Based on that chart, Clardy opined

Ibarra's BAC at the time of driving was .0768 percent. The chart shows the highest level of BAC possible based on the measured results. In exhibit D, he used a 5 as the third decimal place for the subsequent chemical test results. The officer did not record the results of the second set of breath tests to the third decimal place, so the 0.09 could have been anywhere from 0.090 to 0.099 and the 0.11 could have been anywhere between 0.110 and 0.119. Clardy used 0.095 and 0.115 because this amount was half way. Based on this chart, Ibarra's BAC at the time of driving would have been 0.073. In exhibit E, Clardy truncated the measurements to only two decimal places, as provided in Title 17 of the Code of Regulations. (Cal. Code Regs., tit. 17, § 1220.4, subd. (b); hereafter Title 17.) Thus, for the PAS test results, he truncated both results to 0.08. Based on this chart, Ibarra's BAC at the time of driving was 0.06.

Clardy opined that, at the time of the traffic stop, Ibarra's BAC was rising and the rate of increase put the level at 0.06 at the time of driving, consistent with Title 17. He testified his conclusion was based solely on the time of driving and the measured test results, a "pure scientific evaluation of the measured data that was collected." It was not dependent on the veracity of information about Ibarra's drinking pattern, but on the veracity of the testing, although the result was consistent with the drinking pattern reflected in the police report.

Clardy's testimony constituted evidence that, if believed, would support a finding of the nonexistence of the presumed fact—that Ibarra's BAC was 0.08 or above at the time of driving. Thus, the presumption disappeared and the trial court was required to weigh all the evidence and inferences to reach a determination regarding Ibarra's BAC at the time of driving. The Department presented no expert evidence contradicting Clardy's opinions and conclusions; it presented no evidence challenging the factual bases of his opinions.

The Department contends the expert testimony was insufficient to rebut the three-hour presumption because it was speculative. It contends an expert's opinion must be

based on a sound foundation (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770), but Clardy's opinion ignored differences in individual physiology, even though Clardy testified such differences would affect the rate of alcohol absorption.

The cases the Department relies on in arguing physiology had to be taken into account by an expert in expressing his opinion on an individual's BAC at a particular time do not support its argument in this case. In *People v. Thompson* (2006) 38 Cal.4th 811, the issue was whether exigent circumstances justified officers' warrantless entrance into the defendant's house to arrest him for driving under the influence, because of the potential loss of evidence of his intoxication. The court was "unpersuaded by defendant's claim that any exigency is eliminated because of the possibility an expert could testify about the defendant's blood-alcohol level at an earlier point 'by extrapolating backward from the later-taken results.' As courts have recognized, 'such extrapolations can be speculative.' [Citation.] '[T]here are numerous variables such as weight, or time and content of last meal which may affect the rate at which the alcohol dissipates.'" (*Id*. at p. 826.) The court was not dealing with a case in which the expert based his opinion on two sets of breath test results taken at different times within three hours after driving, testified that the rate of alcohol absorption was linear, and extrapolated from those facts the BAC at the time of driving.

In *People v. Warlick* (2008) 162 Cal.App.4th Supp. 1, the court noted there were "Supreme Court decisions recognizing the validity of retrograde extrapolation evidence," and concluded the fact that those extrapolations can be speculative goes to the weight, rather than the admissibility, of the testimony. (*Id*. at p. 6.)

The Department has presented no legal authority and identified no evidence in the record that challenged Clardy's testimony that a person's BAC at a particular time can be determined from the measured results of tests of the person's BAC at two other times, without regard to individual differences that may vary the rate of absorption or

elimination of the alcohol among individuals. Thus, the Department has not established Clardy's testimony was speculative or without adequate foundation.

Based on the evidence presented at the administrative hearing, including the officer's observations at the time of the traffic stop, the information Ibarra provided regarding eating and drinking prior to the traffic stop, the PAS test results, the field sobriety test performance, the subsequent evidentiary breath test results, and Clardy's expert testimony, we conclude substantial evidence supports the trial court's determination that Ibarra rebutted the three-hour presumption and the weight of the evidence was in Ibarra's favor.

B. Time of driving

The Department next contends Clardy testified Ibarra's BAC was 0.06 percent "at the time of driving," but "there is no substantial evidence that 'at the time of driving' equates to 10:22 p.m.," when Ibarra testified he had been driving at least 10 minutes before the traffic stop. It contends that, if the "time of driving" was earlier than 10:22 p.m., Ibarra's BAC could have risen to 0.08 percent by 10:22 p.m. When Clardy first proffered his three charts, however, he testified that they showed the range of BAC applicable "at 10:22, which is the time of driving." Substantial evidence supports the conclusion Clardy testified to Ibarra's BAC at 10:22 p.m., which was the time of driving.

C. Use of truncated PAS results

The Department next contends Clardy's opinion was speculative because he truncated the PAS test results to two decimal places and opined based on those numbers that Ibarra's BAC at the time of driving was 0.06 percent. It argues Title 17's provision for using only two decimal places establishes only a reporting requirement and does not require deleting the digit in the third decimal place when calculating BAC at the time of driving. This argument ignores the other two charts presented by Clardy, both of which used the actual PAS results with all three decimal places, and both of which resulted in a

BAC below 0.08 percent at the time of driving. The Department has not demonstrated any prejudicial error arising from Clardy's method of calculation.

D. Circumstantial evidence of intoxication

Finally, the Department contends the trial court ignored circumstantial evidence that Ibarra was driving with a BAC of 0.08 percent or greater. The Department cites *Coffey* for the proposition that circumstantial evidence, such as erratic driving, physical symptoms of intoxication, plausibility of the driver's version of what occurred, and performance of field sobriety tests, may be combined with the results of chemical tests to overcome the driver's argument that his BAC was below the limit at the time of driving, and rose above it later.

In *Coffey*, the driver's expert forensic toxicologist testified, based on two sets of chemical test results taken about 20 minutes apart, that Coffey's BAC was rising at the time of the tests, and the test results were consistent with a BAC below the limit at the time of driving. (*Coffey*, *supra*, 60 Cal.4th at p. 1205.) The hearing officer rejected the expert's opinion and upheld the license suspension based on the arresting officer's testimony regarding his observations of Coffey and Coffey's performance on the field sobriety tests. (*Id*. at p. 1206.) The trial court denied the driver's writ petition, finding that, even if Coffey rebutted the three-hour presumption, the weight of the evidence, including the chemical test results and the assessment, observations and tests by the arresting officers, supported the hearing officer's decision. (*Ibid*.)

The court concluded that, assuming Coffey presented sufficient evidence to rebut the three-hour presumption, it was proper to admit non-chemical test evidence bearing on the driver's BAC because, "while not dispositive, [it] may be relevant and thus admissible to help interpret the results of a chemical test for a driver's BAC." (*Coffey*, *supra*, 60 Cal.4th at pp. 1211, 1215.) "[C]ircumstantial evidence that plaintiff was weaving erratically all over the roadway, smelled strongly of alcohol, and failed a battery of field sobriety tests may bolster chemical test results showing that she had attained or

exceeded [the 0.08 percent] BAC level." (*Id*. at p. 1216.) Thus, *Coffey* merely determined the hearing officer and the trial court could consider non-chemical test evidence to support a finding that the driver's BAC exceeded the limit, even in the face of expert testimony to the contrary.

In *Yordamlis*, at the administrative hearing, the Department presented evidence the driver "was driving erratically, smelled of alcohol, and had bloodshot/watery eyes, slurred speech, and an unsteady gait." (*Yordamlis, supra,* 11 Cal.App.4th at p. 660.) It presented chemical test results showing a BAC of 0.17 percent, but no evidence regarding when, in relation to the driving, the chemical test was performed. (*Ibid*.) The driver presented no evidence. (*Id*. at p. 659.) As in this case, the hearing officer found in favor of the Department, but the trial court found in favor of the driver. (*Id*. at pp. 658–659.) Affirming the trial court judgment, the court stated: "Finally, we do not agree that the evidence regarding the manner in which Yordamlis drove, his behavior, or his physical condition *requires* a different result. We recognize that some courts have stated that such facts are both relevant and admissible as circumstantial evidence that a driver's BAC was above the legal limit at the time of driving. [Citations.] However, nothing in the record establishes that Yordamlis's conduct is necessarily inconsistent with a BAC of less than 0.08 percent. On the contrary, the Legislature based its decision in 1989 to lower the legal limit from 0.10 percent to 0.08 percent on 'medical and driving demonstration studies [that] revealed that *most* people are impaired at a BAC of 0.05 percent or greater.' [Citation.] Thus, the evidence on which the DMV relies is consistent with a finding that Yordamlis's BAC at the time of driving was lower than 0.08 percent." (*Id*. at pp. 662–663.)

The Department points to nothing in the record to support its assertion that the trial court ignored evidence except its ruling in favor of Ibarra. The ruling does not indicate the trial court ignored or failed to consider any of the evidence presented. As Ibarra points out, at the hearing of the writ petition, the trial court stated, "I've looked at the

record pretty closely." The trial court was not required to find Ibarra's BAC at the time of driving was 0.08 percent or above based on evidence of his physical manifestations of intoxication at the time of the traffic stop, nor is there anything in the record establishing the trial court ignored that evidence.

The Department contends the circumstantial evidence of Ibarra's condition at the time of the traffic stop, combined with the PAS and subsequent chemical test results, was sufficient to reject the expert's testimony and find in favor of the Department. The question before us is not whether the evidence would have been sufficient to support a judgment in favor of the Department, however, but whether it was sufficient to support the decision the trial court actually made—in favor of Ibarra. When the trial court's decision is supported by substantial evidence, this court may not reweigh the evidence or substitute its judgment for that of the trial court. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630–631.) The Department has not demonstrated any error in the judgment.

DISPOSITION

The judgment of the trial court is affirmed. Ibarra is entitled to his costs on appeal.

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HILL, P.J.

WE CONCUR:

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DETJEN, J.

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PEÑA, J.